



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 30, 2008

Mr. Marc Allen Connelly  
Deputy General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2008-13391

Dear Mr. Connelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 323391.

The Texas Department of State Health Services (the "department") received two requests for information pertaining to the Lufkin Dialysis Center. The second requestor also requests information pertaining to twelve additional dialysis centers, copies of formal complaints filed with and Level III correctives issued by the department, and information regarding deaths in dialysis centers.<sup>1</sup> You state you have released some of the requested information. You also explain, due to the department's records retention schedule, the department does not have some of the requested information.<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the

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<sup>1</sup>The department sought and received a clarification of the information requested for the second request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>3</sup>

Initially, we note, and you acknowledge, the department failed to comply with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office for the first request for information. *See* Gov't Code § 552.301(a), (b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You raise the common-law informer's privilege for information that is responsive to the first request for information pertaining to the Lufkin Dialysis Center. Because the purpose of the common-law informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the common-law informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision No. 549 at 6 (1990). Thus, the common-law informer's privilege does not constitute a compelling reason to withhold information for purposes of section 552.302. Because the department did not raise the common-law informer's privilege within ten business days of the first request for information, the department has waived its claim under the informer's privilege for the responsive information pertaining to the Lufkin Dialysis Center. However, your remaining claims under section 552.101 of the Government Code and section 552.137 of the Government Code can provide compelling reasons to withhold information; therefore, we will consider your arguments regarding these exceptions for the information pertaining to the Lufkin Dialysis center.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 1306(a) of title 42 of the United States Code provides the following:

- (1) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act [42 U.S.C.A. § 1001 et

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<sup>3</sup>We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

seq.] or under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code [of 1939], or under regulations made under authority thereof, which has been transmitted to the head of the applicable agency by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the head of the applicable agency or by an officer or employee of the applicable agency in the course of discharging the duties of the head of the applicable agency under [chapter 7 of title 42 of the United States Code], and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by federal law.

(2) For purposes of this subsection . . . the term "applicable agency" means-

(A) the Social Security Administration, with respect to matter transmitted to or obtained by such administration or matter disclosed by such administration; or

(B) the Department of Health and Human Services, with respect to matter transmitted to or obtained by such Department or matter disclosed by such Department.

42 U.S.C. § 1306(a). You also cite to subsections 401.101(a)(1), (b), and (c) of title 42 of the Code of Federal Regulations and the Centers for Medicare and Medicaid Services ("CMS") State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. You explain the department is the Medicare state survey agency pursuant to an agreement with the CMS. You seek to withhold the submitted "Medicare/Medicaid Certification and Transmittal" forms and their supporting documentation under section 1306(a)(1).<sup>4</sup> Federal regulations require the department to release official reports that relate to a program validation survey or evaluate the performance of a provider of services, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 U.S.C. § 1306(e), (f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). Upon review, we are unable to determine if the information at issue consists of "official reports." Thus, if the information at issue consists of "official reports" under section 1306, then the department must withhold the information that identifies individual patients, individual health care practitioners, or other individuals under section 1306(e)(3) of the title 42 of the

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<sup>4</sup>We note the information you seek to withhold does not contain the CMS 2567 forms you seek to withhold.

United States Code, but must release the remaining information. If the information does not consist of "official reports," then the department must withhold the information at issue in its entirety under section 552.101 of the Government Code in conjunction with section 1306(a) of title 42 of the United States Code.

Section 552.101 also encompasses Chapter 251 of the Health and Safety Code, which relates to end stage renal disease facilities. Section 251.015 provides as follows:

(a) A medical review board shall advise the department on minimum standards and rules to be adopted under this chapter.

(b) The medical review board shall review the information on quality of care provided in the annual report filed under Section 251.013(f) and other appropriate information provided to or compiled by the department with respect to an end stage renal disease facility. Based on the review, the medical review board may advise the department about the quality of care provided by a facility and recommend an appropriate corrective action plan under Section 251.061 or other enforcement proceedings against the facility.

(c) Information concerning the quality of care provided to or compiled by the department or medical review board and a recommendation of the medical review board are confidential. The information or recommendation may not be made available for public inspection, is not subject to disclosure under Chapter 552, Government Code, and is not subject to discovery, subpoena, or other compulsory legal process.

(d) The department, in its discretion, may release to a facility information relating to that facility that is made confidential under Sub-section (c). Release of information to a facility under this subsection does not waive the confidentiality of that information or the privilege from compulsory legal process.

Health & Safety Code § 251.015. Section 251.061 of the Health and Safety Code provides in part:

(g) A corrective action plan is not confidential. Information contained in the plan may be excepted from required disclosure under Chapter 552, Government Code, in accordance with that chapter or other applicable law.

*Id.* § 251.061(g). You state a portion of the information relates to end stage renal disease facilities licensed by the department. You state these documents contain information concerning quality of care that was provided to or compiled by the department or a medical review board and a recommendation of the medical review board. You inform us the state surveyor created the submitted State Forms upon inspection of the facility. You explain that the left column of the State Forms contains the deficiencies cited, much of which is quality

of care information. You also contend portions of the remaining information are confidential under section 251.015(c). Based on your representations and our review of the information at issue, we agree that except where we have marked for release, the marked information is confidential under section 251.015(c) of the Health and Safety Code. Therefore, this information must be withheld from disclosure under section 552.101 of the Government Code.<sup>5</sup>

Section 552.101 also encompasses the doctrines of common-law privacy and constitutional privacy. Common-law privacy protects information if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). Because privacy is a personal right that lapses at death, the common-law and constitutional rights to privacy do not encompass information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

You claim portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with common-law and constitutional privacy. Upon review of the remaining information, we find the information we have marked consists of highly intimate or embarrassing information that is not of legitimate public interest. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

remaining information you have marked constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Accordingly, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Furthermore, we conclude you have not shown that any of the remaining information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Therefore, none of the remaining information at issue may be withheld under section 552.101 on the basis of constitutional privacy.<sup>6</sup>

Section 552.101 also encompasses the Medical Practices Act ("MPA"). Medical records are confidential under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a), (b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find you have failed to demonstrate how any portion of the remaining information you have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, none of the remaining information you have marked may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You claim that the e-mail addresses you have marked are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note that section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You inform us you have not received consent for the release of the email addresses at issue. Therefore, with the exception of the information we have marked for release, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, if the submitted "Medicare/Medicaid Certification and Transmittal" forms consist of "official reports" under section 1306(e) of title 42 of the United States Code, then the department must withhold the information that identifies individual patients, individual health care practitioners, or other individuals under section 1306(e)(3) of the title 42 of the United States Code, but must release the remaining information. If these forms do not consist of "official reports," then the department must withhold these forms in their entirety under section 552.101 of the Government Code in conjunction with section 1306(a) of title 42 of the United States Code. With the exception of the information we have marked for release, the department must withhold the information it has marked under section 552.101 in conjunction with section 251.015(c) of the Health and Safety Code. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. With the exception of the information we have marked for release, the department must withhold the e-mail addresses it has marked under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body

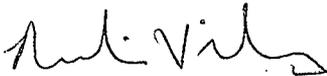
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/jh

Ref: ID# 323391

Enc. Submitted documents

c: Mr. Paul Weber  
The Associate Press  
4851 LBJ Freeway, Suite 300  
Dallas, Texas 75244  
(w/o enclosures)

Mr. Kirk Mathis  
Chandler Law Office  
207 East Frank  
P.O. Box 340  
Lufkin, Texas 75902  
(w/o enclosures)